INDEX

Table of Contents

		Page
1.	Reports of the Opinions Delivered by Lower Courts	2
2.	Basis of Jurisdiction	2
3.	Questions Presented For Review	3
4.	Constitutional Provisions and Florida Statutes Involved	3
5.	Summary Statement of the Case	4
6.	Reasons Authorizing Writ	6
7.	Prayer for Writ	14
8.	Appendix	15

Table of Cases

1.	Appleby v. New York, 271 U.S. 365, 70 L.Ed. 92	9
2.	Farrington v. Tennesssee, 95 U.S. 679, 24 L.Ed. 558	7
3.	Gies v. Fischer, Fla. 1962, 146 So. 2d 361	6
4.	Wood v. Lovett, 313 U.S. 363, 85 L.Ed. 1404	7

Statutes and Constitutional Provisions

1.	United States Constitution, Article 1, Section 10, Clause 1	6
2.	United States Constitution Amendment 14	6
3.	Floridt Statutes, 1955, 253.15	4
4.	Florida Statutes, 1957, 253.122	12
5.	Florida Statutes, 1957, 253.12	4
6.	F.C.A., Title 28, Section 1257(3)	2

SUPREME COURT OF THE UNITED STATES

No._____

THE CORTEZ COMPANY,

Petitioner,

vs.

COUNTY OF MANATEE, et. al

Petition for Writ of Certiorari

To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States:

Your Petitioner, The Cortez Company, respectfully prays this court for the issuance of a writ of certiorari to the Supreme Court of the State of Florida to review the decision and judgment of said Supreme Court of the State of Florida in the above entitled cause, dated January 17, 1964, and which became final upon that Court's denial of Petitioner's petition for rehearing on February 13, 1964, and the issuance of the mandate of said court on that date directed to the Circuit Court of Manatee County, Florida, affirming the decision of said lower court.

Reports of the Opinions Delivered by Lower Courts

1. Opinion of the Supreme Court of Florida affirming order of Circuit Court dismissing the Petitioner's complaint, not yet reported, was announced January 17, 1964. Mandate issued February 13, 1964, a copy of said opinion appears in the appendix hereto.

2. Order of the Supreme Court of Florida denying Petition for Rehearing was filed February 13, 1964. A copy of said order appears in the appendix hereto.

Basis of Jurisdiction

Petitioner seeks to have reviewed that order entered by the Supreme Court of the State of Florida in the above entitled cause, dated January 17, 1964, which became final upon a denial of Petitioner's petition for rehearing dated February 13, 1964, and the issuance of the mandate of said court on that date.

The jurisdiction of this court is invoked under the provisions of the following Statute of the United States: FCA, Title 28, Section 1257(3)

Section 1257(3) supra:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows. . . .(3) By writ of certiorari where the validity of a treaty or statute of the Uniited States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity, is specially set up or

claimed under the Constitution, treatiess or statutes of, or commission held or authority exercised under, the United States.

Questions Presented for Review

1. Is Section 253.122 of the 1957 Florida Statutes void and unconstitutional in that it impairs the obligations of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

2. Is the decision fixing such a bulkhead line void and unconstituonal in that it impairs the obligation of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

3. Is the decision fixing such a bulkhead line void and unconstitutional in that it is a taking of the private property outside the bulkhead line, without just compensation contrary to Amendment XIV of the Constitution of the United States?

Constitutional Provisions and Florida Statutes Involved

1. United States Constitution, Article 1, Section 10, Clause 1-FCA, Constitution, page 205.

2. United States Constitution, Amendment 14, - FCA, Amendments, Page 65.

3. Section 253.122, Florida Statutes, 1957.

4. Section 253.15, Florida Statutes, 1955.

5. Section 253.12, Florida Statutes, 1957.

Summary Statement of the Case

This application is based upon proceedings had in the Circuit and Supreme Courts of the State of Florida, upon motion to dismiss Petitioner's complaint.

On October 6, 1955, Petitioner entered into a contract with the trustees of the Internal Improvement Fund of the State of Florida, an agency authorized by statute to convey title to certain submerged lands in Florida, whereby Petitioner agreed to purchase and the said trustees agreed to sell approximately 75 acres of submerged lands in Manatee County, Florida.

There was in existance at that time Section 253.15 of the Florida Statutes which provided that in case submerged lands were sold by the Trustees pursuant to the above mentioned statutory law the purchaser had the right to fill in and set the bulkhead line for the land.

In 1957 Section 253.12 of the Florida Statutes was enacted, which conferred the right to ascertain and establish or alter bulkhead lines beyond which further filling operations or extensions were prohibited, upon the Board of County Commissioners of each county, subject to approval of the said Trustees of the Internal Improvement Fund.

On February 19, 1958, the said Trustees, pursuant to the abovementioned contract, conveyed a fee simple deed to approximately 75 acres of land in Manatee County, Florida, to the Petitioner.

On July 6, 1959, the Board of County Commissioners of Manatee County, Florida, established a bulkhead line across said lands and approximately 35 acres of said lands were thereby cut off from any type of filling operations.

Petitioner duly protested, without avail, to both the Board of County Commissioners and the Trustees of the Internal Improvement Fund.

On September 11, 1962, the Petitioner filed a Suit for Declaratory Decsree in the Circuit Court of the Twelfth Judicial Circuit for Manatee County, Florida, alleging, inter alia, that the action by the Board of County Commissioners in fixing the bulkhead line, as it related to petitioner's lands, impaired the obligation of petitioner's contract with the Trustee of the Internal Improvement Fund in violation of Article 1, Section 10 of the United States Constitution and constituted a taking of petitioner's property without due process of law in violation of the 14th amendment to the United States Constitution. It was further contended that Section 253.12 of the Florida Statutes was unconstitutional in that it impaired the obligation of the contract between petitioners and the Trustee of the Internal Improvement Fund.

Respondents filed motions to dismiss the said complaint for failure to state a cause of action and on the 25th day of February 1963 the Circuit Court ordered that the complaint be dismissed for this reason, and stated in part as follows:

> "That Section 253.122, Florida Statutes, is a valid and constitutional exercise of the legislative authority of the Legislature of the State of Florida, and that no rights lawfully vesting in the Plaintiff herein under the conveyances described in the Complaint have been infringed upon by the application of this legislation as set forth in this Complaint. This opinion and these findings are rendered in reliance upon the authority of the Supreme Court of the State of Florida in Deering vs. Martin (1928),

116 So. 55 and Gies vs. Fischer (1962), 146 So. 2d 361."

On the 5th day of April, 1963, petitioner filed its notice of appeal to the Florida Supreme Court and argued, both in its Appellant's Brief and on oral argument that its contractual rights had been impaired contrary to Article 1, Section 10, of the United States Constitution by virtue of the establishment of the said bulkhead line and that the establishment of the bulkhead line was a taking of petitioner's property without just compensation within the meaning of the 14th Amendment to the Constitution of the United States.

On January 17, 1964, the Florida Supreme Court entered an order affirming the Circuit Court Order stating that the case of *Gies v. Fischer*, Fla. 1962 146 So 2d *361*, disposed of the constitutional questions contrary to the appellant's contentions.

On the 30th day of January 1964, petitioner filed a petition for rehearing with the Florida Supreme Court. On the 13th day of February said petition for rehearing was denied by the Florida Supreme Court.

Petitioner now elects to pursue his remedy by petition for writ of certiorari to the Supreme Court of the United States.

Reasons Authorizing Writ

The contract entered into between the Petitioner herein and the Trustees of the Internal Improvement Fund was an Executory contract made in accordance with and pursuant to, the statutory law of Florida then in effect and was within the purview of Article 1, Section 10, of the United States Constitution which provides that,

"no state . . . shall pass any . . . law impairing the obligation of contracts." In *Farrington v. Tennessee*, 95 U.S. 679, 24 L.Ed. 558, this court held not only that the constitutional prohibition applies to executory contracts but also that the amount of the impairment is immaterial and "if there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of their Court to redeem the wrong."

Certainly, the valid laws subsisting at the time and place of making a contract enter into and become a part of the contract as if they were expressly referred to and incorporated therein; furthermore, Petitioner respectfully contends that particularly in a situation such as the instant case, where the parties have contracted upon a subject which is surrounded by statutory limitation and requirements, they are presumed to have entered into their agreement with referenc to such statutes, and the same enter into and become a part of the contract.

In the case of *Wood v. Lovett*, 313 U.S. 363, 85 L.Ed. 1404, this Court held that a state statute immunizing tax titles from attack because of certain irregularities and informalities in the proceedings prior to the tax sale created in one who purchased a tax title from the state while the statute was in force, a contract right which cannot be impaired by the subsequent repeal of the statute.

Appeal to this Court in the*Wood* case presented the question whether an Arkansas act repealing such a statute violated Article 1, Section 10, of the United States Constitution.

This Court, in reversing an Arkansas Supreme Court decision upholding a decree in favor of the of the Plain-

tiff in a suit to cancel the state's deeds of property acquired at a tax sale, stated as follows:

> "The Act of 1935, taken in connection with the other statutes regulating the acquirement by the State and the disposition by it of lands sold for delinquent taxes, constituted in effect an offer by the State to those who might become purchasers of such lands, and *the protection if afforded to the title acquired by such purchaser necessarily inured to every purchaser acting under it and constituted a contract with him* . . . But the appellants, as purchasers from the State, were given by the Act of 1935, an important assurance that the State would not itself take away, or authorize "others to destroy the estate which it had granted, by reason of technical defects in procedure cured by the Act of 1935.
>
> "It begs the question to say that the State may not abdicate its police power. In the exercise of the policy committed to the legislature it is competent for the State to enter into a contract which it intends as an assurance of protection to its grantee. This we think the State has plainly done in the present instance. The Judgment is reversed."
>
> (85 L.Ed. pages 140, 1408)

In the case at Bar the impairment of Petitioner's contract by the passage of F.S. 253.122, is both real and apparent. The State of Florida, through the Trustees of the Internal Improvement Fund, contracted to sell certain lands to Petitioners with the Petitioners to have the right to bulkhead, fill in, develop and improve same into extremely valuable lands.

The subsequent fixing of the bulkhead line (beyond which filling and developing operations were prohibited) by the Board of County Commissioners of Manatee

County, Florida, effectively drew a line across Petitioner's lands, rendering said lands completely useless.

The decision of this Court in the case of *Appleby v. New York*, 271 U.S. 365, 70 L.Ed. 92, considered and decided the very question presented by this petition.

The *Appleby* case involved a suit by the executors of one Charles E. Appleby who held deeds in fee simple from the City of New York made in 1853 and 1852,, one deed to their testator Appleby and one to Latou who later conveyed to Appleby. The land conveyed consisted of two water lots in the City of New York. The suit was brought in 1914, over sixty years after the conveyances, to restrain the defendant, the City of New York, and the lessees of the city's piers from dredging the land under water conveyed by the deeds and from using the water over the lots of the plaintiff's as slips and mooring places for vessels alongside those piers. A portion of these lands was filled.

In 1855, the legislature enacted into law an act, to establish for the harbor bulkhead and pier lines for the avowed reason that grants had been made and piers built which obstructed river navigation and the act made provision for a harbor improvement and also provided that it would be unlawful to fill in with earth-stone or other solid material in the waters of the port beyond the bulkhead line. In the same year, 1855, by virtue of the act, the Harbor Commission established a bulkhead line west of 12th Avenue. The Supreme Court said:

> "The necessary effect of this legislature and action, if made effective, was . . . to prevent the filling of plaintiff's lots outshore from the bulkhead line and the making of docks on the lots and the

enjoyment of wharfage at the ends thereof within 100 feet of the city's piers."

In 1871 another law was enacted relating to the government of the City of New York establishing the Department of Docks and providing that it should determine upon such plans as they deemed wise for the whole waterfront and submit them to the Commissioners of the Sinking Fund, who might adopt or reject any such plan. After the plan was adopted under this act, no wharf, pier or bulkhead, could be constructed except in accordance with the plan. This act went on to authorize the department to acquire for the benefit of the city by the purchase or by condemnation lands not owned by the city. By this act of 1871 the bulkhead line for solid filling was fixed at 150 feet west of 12th Avenue, instead of 100 feet as previously fixed. This bulkhead line was fixed across the land of plaintiff and left submerged lands owned by the plaintiff outside the bulkhead line.

The city, over the protest of the plaintiff, had erected and constructed concrete and steel piers, erected thereon steel sheds, leased them to tenants and the piers had numerous doors and windows which opened onto the water over the Appleby lot so that boats were constantly moored and fastened upon the Appleby property.

The suit was to enjoin the city and its tenants and other defendants from using plaintiff's lots and from dredging them. The Supreme Court and the Court of Appeals of New York held for the defendants. The Supreme Court of the United States reversed the judgment of the New York Courts holding that the deeds were contracts and were absolute deeds of land under

water with the right of the grantee to fill it. The court, on page 1004 of the decision, stated:

> "If we are right in our conclusion as to the effect of these deeds under the law of New York at the time of their execution, then there can be no doubt that the laws of 1357 and 1871 as enforced in this case impair the contract made by the City with the grantees of these deeds."

The Court continued:

> "Our conclusions are that Appleby and Latou were vested with the fee simple title in the lots conveyed, and with a grant of the wharfage at the ends of the lots on the river, that with respect to the water over those lots and the wharfage, the state and the city had parted with the jus publicum and jus privatum and that the city can only be revested with that by a condemnation of the rights granted.
>
> * * * *
>
> "The application of the Acts of 1857 and 1871 by the courts of New York would reduce the rights which were intended to be conveyed in these deeds to practically nothing, *and would leave the grantees only the privilege of paying taxes for something quite unsubstantial.* The qualification of those rights by the order of the Secretary of War still leaves value in the deeds, if the Acts of 1857 and 1871 are invalid, as we would hold them to 'be when applied as they have been in this case'."
> (Page 1007, L.E.)

Admittedly the constitutional prohibition against impairment of the obligation of contract must be construed in harmony with the inherent police power of the state. But interference with constitutional guar-

anties, through a *valid, reasonable* and *not arbitrary* exercise of police power, can be justified only by exceptional circumstances that must indicate their exercise to be in the interest of the general public.

In the instant case there has been no determination that petitioner's lands outside the bulkhead line are necessary for use by the public for the purpose of commerce or navigation or for any other "public use" nor has there been a valid determination that the fixing of this bulkhead line is in the interest of the general welfare. Petitioner has not even been permitted to *plead and prove* that said lands are not needed for such purpose.

The fixing and establishing of a bulkhead line across the property of Petitioner's has destroyed the value of the land, has absolutely ruined the marketability of the lands, and operates as a complete legal restraint on the use of these lands.

If F.S. 253.122 and the action of the Board of County Commissioners of Manatee County, Florida, is upheld then no property rights in this country are safe and secure in the properties of individuals and their rights therein can be taken for the public use merely upon the whim or caprice of a board or bureau by the drawing of a line or passing of a resolution, all without regard to the constitutional rights of the individual property owners involved.

The fixing and establishment of a bulkhead line across the property of Petitioners in this case destroyed the value of Petitioners' lands since there remains absolutely no use to which the land outside the bulkhead line may be put.

In addition to defining navigable waters as all "coastal and intracoastal waters" Section 253.12 provides that when the bulkhead line is fixed or established it represents a line beyond which a further extension creating or filling lands shall be deemed an interference with the servitude in favor of commerce and navigation which means simply that in this case the lands of the Petitioners are being taken without just compensation. No condemnation proceedings have been begun. No right or interest of the public in Petitioners' lands has been shown. No public necessity for the use of Petitioners' lands has been alleged, exhibited or proven.

Certainly this constitutes a "taking" or deprivation of property even though actual ownership of the property has not been transferred from the Petitioner. Petitioner contends that the constitutional prohibition was intended to protect all the essential elements of ownership which made property valuable and petitioner further contends that, although, what is a taking of property within the above stated amendment to the Federal Constitution is not always clear, nevertheless, there is a "taking" when the act involves an actual interference with property rights which results in other than consequential or incidental injuries.

In the instant case the bulkhead line, if allowed, would have the effect of prohibiting the Petitioner from the logical, reasonable use of its land and its vested right to improve and develop same. Thus their property has been taken without just compensation.

Prayer for Writ

WHEREFORE, Your Petitioner prays that a writ of certiorari issue under the Seal of this Court directed to the Supreme Court of the State of Florida commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the said case of:

The Cortez Company vesus Manatee County, et al, so styled upon its docket, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States, and that the judgment herein of the said Supreme Court of the State of Florida be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

By_____

Robert E. Knowles, *Counsel for Petitioner*

APPENDIX

1. Opinion of the Supreme Court of Florida, affirming order of Circuit Court dismissing Petitioner's complaint.

IN THE SUPREME COURT OF FLORIDA, JANPARY TERM, A. D. 1964.

THE CORTEX COMPANY,

Appellant,

vs. CASE NUMBER 32,655.

COUNTY OF MANATEE, et al.,

Appellees.

Opinion filed January 17, 1964.

An Appeal from the Circuit Court for Manatee County, Robert E. Willis, Judge

Robert E. Knowles of Knowles, Knowles and Mann,
for Appellant

James W. Kynes, Attorney General,
Robert C. Parker and James T. Carlisle,
Assistant Attorneys General for Appellees

ROBERTS, J.

This appeal is from an order dismissing an original complaint for declaratory and other relief consequent upon a proceeding by which a bulkhead line was set

pursuant to Section 253,122, F.S., across submerged lands purchased by appellant from the appellee trustees of the Internal Improvement Fund under contract of October 6, 1955.

We find that the controverted order must be affirmed upon authority of *Gies v. Fischer*, Fla. 1962, 146 So. 2d 361. That decision disposed of the *constitutional issues* contrary to apellant's contentions, construing the provision of the statute that such a line "shall represent the line beyond which a further extension . . . shall be deemed an interference with the (public) servitude" as vesting a discretion based on factual determinations, and not arbitrary or capricious in nature.

The power vested in the authorities named in the statutes to fix and determine these lines, must be exercised in the interest of the general welfare and not for the purpose of granting advantage to or imposing penalties upon individual upland owners or others. Nothing in the decision in the Gies case nor this decision is to be construed as depriving the courts, in such cases, of jurisdiction or authority to correct such action where or when it ocurs in an appropriate proceeding.

The record in this cause indicates that the propriety of the *procedural* steps followed by the County and the trustees is not in issue, and appellant's objections to the order below in other respects are without merit.

Affirmed.

DREW, C. J., THORNAL, O'CONNELL and CALDWELL, J. J., concur

2. Order of Supreme Court of Florida denying P :tition for Rehearing:

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A. D. 1964,

Thursday, February 13, 1964.

THE CORTEZ COMPANY,
Appellant

- vs -

COUNTY OF MANATEE, et al.,
Appellees

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT OF MANATEE COUNTY)

3. UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 10, CLAUSE 1.

"No State shall . . . pass any . . . law impairing the obligation of contracts . . .

4. UNITED STATES CONSTITUTION, AMENDMENT 14.

"No person shall be . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

5. SECTION 253.15, FLORIDA STATUTES, 1955.

"In case any island or submerged lands are sold, purchasers shall have the right to bulkhead and fill in same. . . ."

6. SECTION 253.12, FLORIDA STATUTES, 1957.

". . . navigable waters . . . shall include all coastal and intracoastal waters, of the state . . ."

7. SECTION 253.122, FLORIDA STATUTES, 1957.

"Subject to the formal approval of the trustees of the Internal Improvement Trust Fund, the Board of County Commissioners of each county . . . are hereby authorized on their own iniative to locate and fixe abulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable waters of the county as defined in Section 253.12 . . . Any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed."